

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES



In the Matter of )  
)

OSF Healthcare System, )  
a corporation, and )

Rockford Health System, )  
a corporation. )

Docket No. 9349  
PUBLIC

**RESPONDENTS OSF HEALTHCARE SYSTEM'S AND ROCKFORD HEALTH SYSTEM'S RESPONSE IN OPPOSITION TO COMPLAINT COUNSEL'S MOTION TO COMPEL FTI CONSULTING, INC.**

Contrary to Complaint Counsel's claims, Respondents OSF Healthcare System (OSF) and Rockford Health System (RHS) have not used the work product doctrine as both a sword and a shield in this proceeding. Respondents have not used or relied upon privileged documents to prove a point, only to later invoke privilege to prevent Complaint Counsel from challenging Respondents' assertions. Rule 3.31A(e) of the Federal Trade Commission's (FTC) Rules of Practice (the Commission's Rules) and Federal Rule of Civil Procedure 26(a)(2)(B) only entitle Complaint Counsel to documents for which Respondents waived privilege or Respondents or their testifying expert relied upon or considered in forming the opinions to which expert testimony will be offered. Respondents and their testifying expert FTI Consulting, Inc. (FTI) have fully complied with the requirements of the Commission's Rules and the Federal Rules of Civil Procedure. Complaint Counsel have already received the only document for which Respondents waived privilege (what Complaint Counsel refer to as the "Merger Report"), and Complaint Counsel have already received all of the documents on which Respondents and their testifying expert, Jeffrey Brown of FTI, considered or relied upon in formulating his opinions

concerning the efficiencies likely to result from the merger. Because Complaint Counsel are attempting to discover privileged documents upon which Respondents have not relied and are not using to support their case, they are not entitled to them.

### **BACKGROUND**

During Complaint Counsel's investigation of the proposed merger, Respondents used the Merger Report prepared by FTI – a consulting expert that Respondents retained through their respective counsel in anticipation of litigation – to estimate the cost savings and efficiencies that the affiliation will likely generate. As detailed in FTI's Response in Opposition to Complaint Counsel's Motion to Compel (FTI Response), Respondents' voluntary production of the Merger Report was not a waiver of privilege as to the entire subject matter of the document.

During the course of *Federal Trade Commission v. OSF Healthcare System and Rockford Health System*, No. 11-cv-50344, currently pending before the United States District Court for the Northern District of Illinois (the Federal Proceeding), Respondents' testifying expert, Mr. Brown of FTI, presented an expert report on January 11, 2012 that essentially re-packaged the Merger Report. Respondents and FTI met their obligations under Rule 26(a)(2)(B) by producing all materials Mr. Brown considered in formulating the opinions he expressed in that expert report (and Complaint Counsel did not suggest anything different in the Federal Proceeding). Neither Respondents nor Mr. Brown considered or relied upon any of the documents which Respondents withheld as privileged, but that Complaint Counsel now seek.

In this proceeding, the same testifying expert, Mr. Brown, produced an expert report on March 9, 2012, which was essentially the same report produced in the Federal Proceeding. Respondents and FTI met their obligations under Rule 3.31A(e) by producing all materials Mr. Brown considered in formulating the opinions he expressed in his March 9 report. At no time

during the Federal Proceeding or this proceeding has Respondents' testifying expert relied on documents that have not been produced to Complaint Counsel.

This Court recognized in its March 8, 2012 Order on Complaint Counsel's Motion to Compel FTI Consulting, Inc. to Produce Documents Requested by Subpoena *Duces Tecum* and to Enforce Subpoenas *Ad Testificandum* that Complaint Counsel have not sufficiently described the documents they are requesting. To the extent that Complaint Counsel are seeking internal communications between FTI employees relating to the Merger Report, for example, which Mr. Brown did not consider or rely upon in formulating the opinions he offered in the expert reports he filed in the Federal Proceeding or in this case, they are not entitled to them.

Complaint Counsel's discussion of what they refer to as the "Performance Report" is a red herring that is irrelevant to the issues of what is discoverable in this case. (Mem. at 4). FTI separately presented OSF and RHS with Performance Reports, which were akin to solicitations by FTI to OSF and RHS to engage FTI anew as a consultant in identifying potential savings each entity might be able to achieve on its own in advance of the merger. Respondents produced the Performance Reports. But nothing about that production entitles Complaint Counsel to pierce the privilege protection for testifying experts. Indeed, the record shows that the Performance Reports do not represent a calculation of savings OSF and RHS could achieve, but simply an indication of cost-savings opportunities that might exist – subject to further review and study by FTI should OSF and/or RHS choose to hire FTI for this purpose. *See* Dawes IH Tr. 72:6-73:11, 78:1-9 (Exhibit A).

In any event, in response to the FTC's Civil Investigative Demand FTI collected, reviewed, and on September 23, 2011 produced the non-privileged responsive documents. *See* FTI Letter dated Sept. 23, 2011 (Exhibit B). These documents included the Performance Reports

and related documents and communications, but consistent with FTI's responses and objections to Complaint Counsel's other attempts at discovery, excluded privileged documents that were not prepared in connection with the Performance Reports, did not constitute the Merger Report, and were not relied on in connection with the preparation of the Merger Report. Consistent with the scope of the work-product privilege afforded to materials prepared by consulting experts, FTI's production excluded privileged documents which Respondents and their consulting, now testifying, expert did not consider or rely upon in preparing the Merger Report.

Near the end of the October 20, 2011 investigational hearing of Clair Tosino, a consultant with FTI who worked on the Merger Report, counsel for FTI discovered that FTI had inadvertently produced privileged excerpts of drafts of the Merger Report contained within the appendices of the Performance Reports. At that time, counsel for FTI noted on the record the privileged nature of those inadvertently produced excerpts and informed Complaint Counsel that it would make a written request for the return or destruction of the inadvertently produced excerpts. *See* Tosino IH Tr. 149:7-150:24 (Exhibit C). Later that same day, counsel for FTI reviewed the September 23, 2011 production for any other inadvertent disclosures, and sent a letter properly requesting to claw-back the inadvertently produced excerpts. *See* FTI Letter dated October 20, 2011 (Exhibit D).

At no time during Complaint Counsel's investigation, the Federal Proceeding, or this proceeding have Respondents or their testifying expert considered or relied on the Performance Reports, or the draft excerpts of the Merger Report inadvertently produced with the Performance Reports. In fact, the versions of the Performance Reports with the draft excerpts of the Merger Report were never presented or given to either OSF or RHS. *See* Dawes IH Tr. 31:21-32:18 (Exhibit A). In sum, Respondents and FTI have met their discovery obligations with respect to

the Performance Reports and related materials, and neither Rule 3.31A(e) or Federal Rule of Civil Procedure 26(b)(4)(B) entitles Complaint Counsel to the draft excerpts of the Merger Report.

### **ARGUMENT**

Complaint Counsel are not entitled to the privileged documents they now seek. With respect to documents protected by the work product doctrine, Complaint Counsel are entitled only to documents (1) for which Respondents waived privilege, or (2) upon which Respondents or their experts relied or considered in the course of preparing the opinions about which expert testimony will be presented in this proceeding. *See* Rule 3.31A(e); Fed. R. Civ. P. 26(a)(2)(B). As explained in the FTI Response, Respondents and FTI met their obligations under the rules: the Merger Report is the only document as to which Respondents waived privilege, and Respondents and FTI have provided everything that Mr. Brown considered or relied upon in formulating the opinions contained in his expert reports in the Federal Proceeding and this proceeding.

Complaint Counsel argue that “Respondents have thrust the Merger Report into center stage in this litigation.” But that is untrue. The waiver of the privilege as to the Merger Report was an explicit, narrow one.

Moreover, Respondents have produced everything upon which they and their expert have relied. Accordingly, Respondents plainly are not using privileged materials as a sword and a shield. Complaint Counsel have not identified any such document.

Indeed, the FTC has no right to consulting expert materials, and has received all of the materials to which they are entitled based on Mr. Brown’s role as a testifying witness (in both the Federal Proceeding and this litigation). FTI’s status as a testifying expert does not abrogate the

privilege as to materials used in its consulting role that were neither considered nor relied upon in formulating the expert opinions on which Mr. Brown will testify in this case.

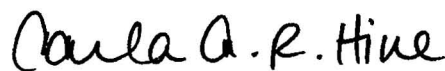
*In re Motor Up Corp., Inc.*, 1999 FTC LEXIS 262 (Aug. 5, 1999), is distinguishable. In that case, it appears that the materials were relied upon but not produced. Here, Respondents and their testifying expert produced all materials which they considered and relied upon in estimating the efficiencies to be gained as a result of the merger.

### CONCLUSION

Respondents have not used privileged material relating to the Expert Report as both a sword and a shield. This Court should deny Complaint Counsel's motion to compel the production of any additional materials or testimony from FTI.

Dated: March 12, 2012

Respectfully submitted,



---

David Marx, Jr.  
William P. Schuman  
Amy J. Carletti  
McDermott Will & Emery LLP  
227 West Monroe Street  
Chicago, IL 60606  
Telephone: (312) 372-2000  
Facsimile: (312) 984-7700  
dmarx@mwe.com  
wschuman@mwe.com  
acarletti@mwe.com

Jeffrey W. Brennan  
Carla A. R. Hine  
Jennifer L. Westbrook  
Nicole L. Castle  
Rachael V. Lewis  
Daniel G. Powers  
James B. Camden  
Shauna A. Barnes  
McDermott Will & Emery LLP

600 13th Street, N.W.  
Washington, D.C. 20005-3096  
Telephone: (202) 756-8000  
Facsimile: (202) 756-8087  
jbrennan@mwe.com  
chine@mwe.com  
jwestbrook@mwe.com  
ncastle@mwe.com  
rlewis@mwe.com  
dgpowers@mwe.com  
jcamden@mwe.com  
sabarnes@mwe.com

*Attorneys for Respondents  
Rockford Health System*

Alan I. Greene  
Matthew J. O'Hara  
Kristin M. Kurczewski  
Hinshaw & Culbertson LLP  
222 N. LaSalle Street, Suite 300  
Chicago, IL 60601  
Telephone: (312) 704-3000  
Facsimile: (312) 704-3001  
agreene@hinshawlaw.com  
mohara@hinshawlaw.com  
kkurczewski@hinshawlaw.com

Michael Iasparro  
Hinshaw & Culbertson LLP  
100 Park Avenue  
Rockford, IL  
Telephone: (815) 490-4945  
Facsimile: (815) 490-4901  
miasparro@hinshawlaw.com

*Attorneys for Respondent  
OSF Healthcare System*

**CERTIFICATE OF SERVICE**

I, Carla A. R. Hine, hereby certify that I served a true and correct copy of the foregoing Public Version of Respondents OSF Healthcare System and Rockford Health System's Response in Opposition to Complaint Counsel's Motion to Compel FTI Consulting, Inc. upon the following individuals by hand on March 12, 2012:

Donald S. Clark  
Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue, NW, Room 172  
Washington, DC 20580

The Honorable D. Michael Chappell  
Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

I, Carla A. R. Hine, hereby certify that I served a true and correct copy of the foregoing Public Version of Respondents OSF Healthcare System and Rockford Health System's Response in Opposition to Complaint Counsel's Motion to Compel FTI Consulting, Inc. upon the following individuals by hand on March 12, 2012:

Matthew J. Reilly  
Jeffrey H. Perry  
Kenneth W. Field  
Richard Cunningham, Esq.  
Jeremy P. Morrison  
Katherine A. Ambrogi  
Andrea Zach  
Jeanne Liu  
Stephanie Reynolds  
Theresa Lau  
Federal Trade Commission  
600 Pennsylvania Ave., N.W.  
Washington, D.C. 20580  
mreilly@ftc.gov  
jperry@ftc.gov  
kfield@ftc.gov  
rcunningham@ftc.gov  
jmorrison@ftc.gov  
kambrogi@ftc.gov  
azach@ftc.gov  
jliu@ftc.gov  
sreynolds@ftc.gov  
tlau@ftc.gov

*Complaint Counsel*



Dated: March 12, 2012

Carla A. R. Hine

Carla A. R. Hine  
*Counsel for Respondent Rockford Health  
System*

DM\_US 32314669-1.046498.0021

# **EXHIBIT A**

**FILED**  
***IN CAMERA***

# **EXHIBIT B**

# McDermott Will & Emery

Boston Brussels Chicago Düsseldorf Houston London Los Angeles Miami Milan  
Munich New York Orange County Paris Rome Silicon Valley Washington, D.C.

Strategic alliance with MWE China Law Offices (Shanghai)

Carla A. R. Hine  
Associate  
chine@mwe.com  
+1 202 756 8095

September 23, 2011

## **BY HAND DELIVERY**

Richard H. Cunningham, Esq.  
Federal Trade Commission  
Bureau of Competition  
Mergers IV Division  
601 New Jersey Avenue, N.W.  
Washington, D.C. 20580

Re: Response to Civil Investigative Demand Issued to FTI Consulting, Inc. (FTC File No. 111-0102)

Dear Mr. Cunningham:

Enclosed please find FTI Consulting Inc.'s ("FTI") supplemental response to the Federal Trade Commission's ("FTC") Civil Investigative Demand No. 111-0102 received on April 8, 2011 (the "CID"). As noted in our letter to you dated September 13, 2011, FTI recently discovered that some documents and materials responsive to the CID were inadvertently omitted from FTI's May 11, 2011 response to the CID. FTI submits this supplemental response pursuant to the confidentiality provisions of Federal Trade Commission Act § 21, 15 U.S.C. § 57b-2, and the FTC's Rules of Practice 4.10-11, 16 C.F.R. §§ 4.10-11, and requests the FTC to treat it as exempt from disclosure under the Freedom of Information Act, 5 U.S.C. § 552(b).

The majority of the documents the CID requests are protected by privilege, including the attorney-client privilege, the attorney work-product doctrine under Rule 26(b)(3) of the Federal Rules of Civil Procedure, and Rule 23(b)(4)(B) of the Federal Rules of Civil Procedure. As noted in our previous correspondence, Hinshaw & Culbertson LLP ("Hinshaw") and McDermott Will & Emery ("MWE") jointly retained FTI and its subsidiary Compass Lexecon on behalf of their respective clients, OSF Healthcare System ("OSF") and Rockford Health System ("RHS"), to perform work in anticipation of any pre-merger investigation by the United States antitrust authorities.

The enclosed supplemental production includes responsive documents that are not protected by privilege, the attorney work-product doctrine, or Rule 26. Producing a privilege log listing every single document in FTI's possession would be unduly burdensome and costly, and the FTC has not provided any justification for requiring FTI to undertake that burden or bear the cost

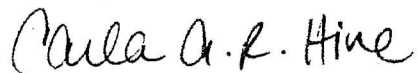
U.S. practice conducted through McDermott Will & Emery LLP.

600 Thirteenth Street, N.W. Washington, D.C. 20005-3096 Telephone: +1 202 756 8000 Facsimile: +1 202 756 8087 www.mwe.com

Richard H. Cunningham, Esq.  
September 23, 2011  
Page 2

producing a privilege log in response to the CID. FTI reserves the right to supplement or amend its objections and responses as necessary.

Sincerely,

Handwritten signature of Carla A. R. Hine in cursive.

Carla A. R. Hine

Enclosures

cc: Katherine Ambrogi, Esq.

DM\_US 30190938-1.046498.0021

---

Form of Certificate of Compliance

---

I certify that to the best of my knowledge all of the documents and information required by the Civil Investigative Demand issued to FTI Consulting, Inc. on April 8, 2011 in connection with FTC File No. 111-0102 (the "CID") that are in the possession, custody, control, or knowledge of the person to whom the demand is directed have been submitted to a custodian named therein.

If a document responsive to the CID has not been submitted, the objections to its submission and the reasons for the objection have been stated.

I declare under penalty of perjury that the foregoing is true and correct.

Signature Margaret E. Guerin-Calvert  
Name Margaret E. Guerin-Calvert  
Title Vice Chairman + Senior Managing Director

# **EXHIBIT C**



**FILED**  
***IN CAMERA***

# **EXHIBIT D**

# McDermott Will & Emery

Boston Brussels Chicago Düsseldorf Houston London Los Angeles Miami Milan  
Munich New York Orange County Paris Rome Silicon Valley Washington, D.C.  
Strategic alliance with MWE China Law Offices (Shanghai)

Carla A. R. Hine  
Associate  
chine@mwe.com  
+1 202 756 8095

October 20, 2011

**VIA E-MAIL *JMORRISON@FTC.GOV***

Jeremy P. Morrison, Esq.  
Federal Trade Commission  
Bureau of Competition  
Mergers IV Division  
601 New Jersey Avenue, N.W.  
Washington, DC 20580

Re: Response to Civil Investigative Demand Issued to FTI Consulting, Inc. (FTC File No. 111-0102)

Dear Jeremy:

On behalf of FTI Consulting, Inc. ("FTI"), I request that you return or destroy certain documents that FTI produced on September 23, 2011 in response to the Federal Trade Commission's ("FTC") Civil Investigative Demand No. 111-0102 received on April 8, 2011. These inadvertently produced documents contain attorney-client communications and attorney work product protected from disclosure, and were inadvertently produced to the FTC.

We will provide you with redacted versions of these documents. In the meantime, I respectfully request that you return or destroy the following documents, including any duplicates of these documents that are in the possession of the FTC and any authorized employee or agent of the FTC.

- FTI00190
- FTI00200
- FTI00204
- FTI00207
- FTI00211

If the FTC does not return the documents noted above, but rather destroys these documents, please verify in writing that the FTC and its agents and employees have destroyed any and all hard and electronic copies of these documents, and that the FTC will not use these documents for

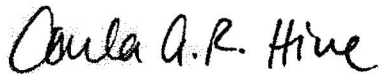
U.S. practice conducted through McDermott Will & Emery LLP.

600 Thirteenth Street, N.W. Washington, D.C. 20005-3098 Telephone: +1 202 756 8000 Facsimile: +1 202 756 8087 [www.mwe.com](http://www.mwe.com)

Jeremy P. Morrison, Esq.  
October 20, 2011  
Page 2

any purpose in the above-referenced matter. Please let me know if you have any questions, and thank you very much for your attention to this matter.

Sincerely,

Handwritten signature of Carla A. R. Hine in cursive script.

Carla A. R. Hine

cc: Alan I. Greene, Esq.

DM\_US 30524956-1,046498,0021

---